

Notes

AIDS-Related Litigation: the Competing Interests Surrounding Discovery of Blood Donors' Identities

I. INTRODUCTION

First recognized in 1981, Acquired Immunodeficiency Syndrome (AIDS) has escalated to the forefront of national concerns.¹ As of June, 1985, 10,533 AIDS cases had been reported by the Centers for Disease Control (CDC).² Scientists predict that by 1987, 40,000 individuals will be diagnosed to have the incurable disease.³ One class of individuals affected, approximately two percent of the total AIDS population,⁴ are those who contracted the disease through blood transfusions. The following hypothetical illustrates the plight of individuals who contracted AIDS from blood transfusions necessitated by another's negligence.

John Doe, a married father of two children, is injured in an automobile accident because of the negligence of a hit and run driver. Doe is taken to a local hospital where he receives multiple units of blood to replace the blood lost through his injuries. Eventually, Doe is released to his home and family.

One year later, Doe's third child is born. For some reason, the infant has persistent fevers and unexplained body rashes. Doe is weak, has night sweats, and is unable to report to work regularly. His wife,

¹See Goldsmith, *Not There Yet, But "On Our Way" in AIDS Research, Scientists Say*, 253 J. A.M.A. 3369 (1985).

²See Marwick, "*Molecular Level" View Gives Immune System Clues*, 253 J. A.M.A. 3371 (1985). See also Centers for Disease Control, U.S. Pub. Health Serv., *Update: Acquired Immunodeficiency Syndrome-United States*, reprinted in 255 J. A.M.A. 593, 593 (1986):

Between June 1, 1981, and Jan. 13, 1986, physicians and health departments in the United States notified the CDC of 16,458 patients (16,227 adults and 231 children) meeting the acquired immunodeficiency syndrome (AIDS) case definition for national reporting. Of these, 8,361 (51% of the adults and 59% of the children) including 71% of the patients diagnosed before July, 1984, are reported to have died. The number of cases reported during each six-month period continues to increase . . . although not exponentially, as evidenced by the lengthening case-doubling times

(footnotes omitted). The case-doubling time as of January, 1986, is eleven months as compared to a doubling time of five months in July, 1982. *Id.* at 593.

³Krim, *AIDS: The Challenge to Science and Medicine*, 1985 HASTINGS CENTER REP. SPECIAL SUPPLEMENT 3.

⁴Centers for Disease Control, U.S. Pub. Health Serv., *Update: Acquired Immunodeficiency Syndrome — United States*, reprinted in 253 J. A.M.A. 3391 (1985) [hereinafter cited as CDC].

who is experiencing similar symptoms, is unable to keep up with their three children.

Over time, Doe, his wife, and their infant child are diagnosed as having AIDS. The doctors explain that Doe most likely received the virus in one of the blood transfusions necessitated by the accident. Doe then passed the virus to his wife through the sharing of body fluids. She, in turn, passed the disease to their child in utero.

In the pending negligence lawsuit against the driver of the hit and run automobile, Doe's survivors seek to discover the names and addresses of the nonparty donors whose blood he received. They seek this information to prove aggravation of injuries, the development of AIDS which caused Doe's death, in order to receive full compensation for the injuries caused by the driver.⁵ The issue, then, is whether Doe's survivors should be entitled to discover the names and addresses of the blood donors.

In a recent decision involving a similar fact situation, *South Florida Blood Service, Inc. v. Rasmussen*,⁶ the Florida Court of Appeals denied discovery of the donors' identities.⁷ In *Rasmussen*, the plaintiff served the nonparty blood bank with a subpoena duces tecum requesting the identities of the donors whose blood the plaintiff had received.⁸ Asserting the rights of the donors, the blood institutions, and society, the blood bank opposed discovery.⁹ The court held that the plaintiff's interest must yield to the donors' privacy interests and the societal and institutional interest of maintaining an adequate and healthy national blood supply.¹⁰ Recognizing the "great public interest" involved, however, the court certified this issue to the Supreme Court of Florida:

Do the privacy interests of volunteer blood donors and a blood service's interest in maintaining a strong volunteer blood donation system outweigh a plaintiff's interest in discovering the names and addresses of the blood donors in the hope that further discovery will provide some evidence that he contracted AIDS from transfusions necessitated by injuries which are the subject of his suit?¹¹

⁵The aggravation of injuries doctrine holds a tortfeasor liable for all foreseeable intervening causes that increase the plaintiff's injuries. Applying the doctrine to the hypothetical fact situation, the hit and run driver is liable for aggravated injuries resulting from the medical treatment of Doe's injuries. Because Doe required blood transfusions to treat his injuries, and because the blood transmitted AIDS to Doe, the tortfeasor is liable for the development of the disease and Doe's resulting death. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* 303-10 (5th ed. 1984).

⁶467 So. 2d 798 (Fla. Dist. Ct. App. 1985).

⁷*Id.* at 804.

⁸*Id.* at 800.

⁹*Id.*

¹⁰*Id.* at 804.

¹¹*Id.* at 804-05 n.13.

The Florida Supreme Court has yet to rule on this question.¹²

Because the incubation period for the AIDS virus can last for five years or longer,¹³ the majority of transfusion transmission lawsuits have yet to surface.¹⁴ Therefore, many courts will face the *Rasmussen* issue, or variations thereof, long after the Florida Supreme Court reaches its decision.

The purpose of this Note is to analyze the interests involved in such a fact situation, through a balancing test similar to that used in *Rasmussen*,¹⁵ and to show that the plaintiff's interest in preserving his right to meaningful discovery, as well as his right to full compensation, deserves far greater weight than it has thus far been accorded. Specifically, this Note will demonstrate that the case law does not support *Rasmussen's* sweeping extension of the disclosural right to privacy.¹⁶ This Note will also show that the societal interest in maintaining an adequate and healthy blood supply, in light of the development of a highly accurate test for the detection of the AIDS virus in donated blood,¹⁷ will not be compromised by allowing discovery.

II. THE DISEASE ITSELF

To appreciate fully the complexity of the legal issues involved in a case such as *Rasmussen*, it is essential to understand the nature and effects of AIDS. Recognized as a disease entity since 1981,¹⁸ AIDS has been declared the nation's top health priority by the federal government.¹⁹ As of June, 1985, \$5.6 billion in medical treatment and lost income had been attributed to the 10,533 disease victims.²⁰ Because the disease is predicted to double its number of victims every ten to twelve months,²¹ and because there is no known cure or vaccine for the fatal virus,²² the number of individuals ultimately to be infected is incalculable.

¹²The petitioner filed his brief with the Supreme Court of Florida on July 17, 1985. See Brief for Appellant, *Rasmussen v. South Florida Blood Service, Inc.*, No. 67,081 (filed July 17, 1985) [hereinafter cited as Appellant's Brief].

¹³Krim, *supra* note 3, at 5.

¹⁴See Marwick, *Blood Banks Give HTLV-III Test Positive Appraisal at Five Months*, 254 J. A.M.A. 1681, 1683 (1985) (opinion of James Curran, M.D., of the Centers for Disease Control) ("Because of the long incubation period, there will continue to be cases of AIDS occurring associated with blood transfusions.").

¹⁵In order to determine whether discovery should be allowed, the *Rasmussen* court balanced the competing interests presented by South Florida and the plaintiff. 467 So. 2d at 801.

¹⁶See *infra* notes 136-37 and accompanying text.

¹⁷See *infra* notes 49-52 and accompanying text.

¹⁸Goldsmith, *supra* note 1, at 3369.

¹⁹*The New Victims*, Life, July, 1985, at 12, 19.

²⁰Marwick, *supra* note 2, at 3371. See also Indianapolis Star, Aug. 5, 1985, at 1, col. 1 (45 confirmed AIDS cases in Indiana with 29 deaths); Indianapolis Star, Sept. 14, 1985, at 6, col. 1 (of the 13,074 AIDS victims in the United States, 6,611 have died).

²¹Krim, *supra* note 3, at 3.

²²*Id.*

Defined by the CDC as "a disease, at least moderately predictive of a defect in cell-mediated immunity, occurring in a person with no known cause for diminished resistance to that disease,"²³ the AIDS virus has been given three names: (1) Human T-lymphotropic Virus Type III (HTLV-III); (2) Lymphadenopathy-Associated Virus (LAV); and (3) AIDS-Associated Retrovirus (ARV).²⁴ Transmission of the virus occurs through the sharing of body fluids, such as sperm, blood, and tears, and through the repeated use of unsterilized skin-piercing instruments.²⁵ Although no cases of transmission through saliva have been documented,²⁶ some scientists suggest that this mode of infection is possible.²⁷ It is not believed that the virus is transmissible through purely casual contact such as touching.²⁸

Once introduced into the blood stream, the AIDS virus infiltrates the T-4 lymphocyte cells.²⁹ The T-4 cell, which has been described as the "true conductor of the immune orchestra," is responsible for activating nearly all of the immune system's disease-fighting processes.³⁰ Once infected, these cells manufacture the AIDS virus instead of fighting infection.³¹ Ultimately, the immune system of the AIDS patient is so depressed that normally benign infections become life threatening.³²

The AIDS virus, which is believed to have originated in Africa,³³

²³Miller, O'Connell, Leipold & Wenzel, *Potential Liability for Transfusion - Associated AIDS*, 253 J. A.M.A. 3419, 3419 (1985) [hereinafter cited as Miller].

²⁴Carlson, Bryant, Hinrichs, Yamamoto, Levy, Yee, Higgins, Levine, Holland, Gardner & Pederson, *AIDS Serology Testing in Low- and High-Risk Groups*, 253 J. A.M.A. 3405 (1985).

²⁵Centers for Disease Control, U.S. Pub. Health Serv., *World Health Organization Workshop: Conclusions and Recommendations on Acquired Immunodeficiency Syndrome*, reprinted in 253 J. A.M.A. 3385 (1985) [hereinafter cited as *W.H.O.*].

²⁶Krim, *supra* note 3, at 4.

²⁷Elrod, *Now a Household Word, It's Invading "Straight World,"* Indianapolis Star, Aug. 4, 1985, at 1, col. 1 (quoting Dr. Kenneth Fife of the Indiana University School of Medicine).

²⁸*W.H.O.*, *supra* note 25, at 3385.

²⁹Marwick, "Molecular Level" View Gives Immune System Clues, 253 J. A.M.A. 3371 (1985).

³⁰*Id.* at 3375 (quoting Anthony S. Fauci, M.D., Director of the Nat'l Inst. of Allergy and Infectious Diseases, Nat'l Insts. of Health).

³¹*Id.* at 3375.

³²*Id.* See Centers for Disease Control, U.S. Pub. Health Serv., *Questions and Answers About Acquired Immunodeficiency Syndrome (AIDS)*, at 2-3 (1985) [hereinafter cited as *Questions and Answers*] (The two opportunistic diseases most often responsible for the death of AIDS patients are Kaposi's Sarcoma, a normally rare disease most often seen in elderly males, and Pneumocystis Carinii Pneumonia (PCP), which is ordinarily seen only in patients whose immune systems are suppressed secondary to leukemia or drug therapy.).

³³Wallis, *AIDS: A Growing Threat*, Time, Aug. 12, 1985, at 44 (citing virologist Myron Essex of the Harvard School of Pub. Health).

occurs primarily in homosexual or bisexual men, intravenous drug abusers, and hemophiliacs.³⁴ The sexual partner of anyone in these three groups is considered to be at high risk to develop the disease.³⁵ Furthermore, the disease has been found in purely heterosexual individuals who have a history of multiple sexual partners or contacts with prostitutes.³⁶ In fact, some authorities suggest that a separate AIDS category should be established to represent heterosexuals who have multiple partners.³⁷

It is estimated that up to one million Americans have been exposed to the AIDS virus.³⁸ Of that million, it is further estimated that five to ten percent will develop AIDS.³⁹ The remaining ninety to ninety-five percent will either carry the virus without developing symptoms or will develop AIDS-Related Complex, a mild version of the pure disease.⁴⁰ It is believed that this ninety to ninety-five percent may transmit the virus whether or not they themselves develop clinical manifestations of the disease.⁴¹

Approximately two percent of the AIDS cases are attributable to blood transfusions.⁴² Of the ninety-two transfusion transmission cases under investigation by the CDC in June, 1985, eighty of the patients had received the blood during operations.⁴³

Prior to 1985, blood centers did not employ uniform AIDS screening techniques.⁴⁴ Most centers posted signs informing those at high risk for the disease to refrain from donating blood.⁴⁵ Other centers provided

³⁴Krim, *supra* note 3, at 3. See also CDC, *supra* note 4, at 3387 (Haitians no longer represent a specific high-risk category).

³⁵See *Questions and Answers*, *supra* note 32, at 3-4. See also Goldsmith, *More Heterosexual Spread of HTLV-III Virus Seen*, 253 J. A.M.A. 3377 (1985).

³⁶Goldsmith, *supra* note 35, at 3378-79.

³⁷Dean F. Echenberg, M.D., Ph. D., Director of the Bureau of Communicable Disease Control, San Francisco, suggests a separate category for heterosexuals with multiple partners. James W. Curran, M.D., and Harold W. Jaffee, M.D., of the Centers for Disease Control, however, do not predict a great rise in the number of heterosexual AIDS cases. However, the experts agree that prostitutes may become functional "reservoirs" for viral transmission to heterosexuals. *Id.* See also Wallis, *supra* note 33, at 43 (the CDC reports 118 cases of heterosexually transmitted AIDS).

³⁸Krim, *supra* note 3, at 5. In late 1984, it was established that New York, California, New Jersey, and Florida were the states of origin for seventy-five percent of the AIDS cases. The remainder of the cases were traced to 41 other states plus Puerto Rico and the District of Columbia. See *Reports on AIDS Published in the Morbidity and Mortality Weekly Report*, (CDC) at 71 (Nov. 30, 1984).

³⁹See Krim, *supra* note 3, at 5.

⁴⁰*Id.*

⁴¹*Id.* See also Rasmussen, 467 So. 2d at 805 n.1 (Schwartz, C.J., dissenting).

⁴²CDC, *supra* note 4, at 3391.

⁴³Miller, *supra* note 23, at 3419.

⁴⁴Office of Technology Assessment, *Blood Policy and Technology*, H.R. Doc. No. 260, 99th Cong., 1st Sess. 101 (1985) [hereinafter cited as O.T.A.].

⁴⁵*Id.*

means by which the donors could anonymously indicate that their blood should not be used for transfusion.⁴⁶ Still others conducted surrogate tests for AIDS.⁴⁷ Many blood organizations declined to question donors about sexual habits because of moral and ethical considerations.⁴⁸

In March, 1985, the Food and Drug Administration licensed the HTLV-III test for use in detection of AIDS antibodies.⁴⁹ Currently, the test is performed on all blood and plasma collected in the United States.⁵⁰ The test, which is 99.8 percent accurate,⁵¹ does not diagnose AIDS; it merely detects the presence of antibodies to the virus, indicating that a person has been exposed to the disease.⁵² Because of the test's effectiveness in detecting the AIDS antibody, medical science may have solved the problem of transfusion transmission of the disease. However, because the incubation period for the virus is estimated to range from two months to five years or longer,⁵³ and because one lot of infected blood could expose up to one hundred recipients,⁵⁴ the majority of transfusion related cases have yet to surface.

Regardless of the mode of transmission, there is no known cure for AIDS.⁵⁵ Because the virus mutates one hundred to one thousand times faster than any other virus, scientists have been unable to study its outer coat long enough to decode its secret formula and prepare a vaccine.⁵⁶ Although scientific evaluation of AIDS continues, those afflicted with the disease today face almost certain death.⁵⁷

As noted by the majority in *Rasmussen*, "The public has reacted to the disease with hysteria. Reported accounts indicate that victims of AIDS have been faced with social censure, embarrassment, and discrimination in nearly every phase of their lives, including jobs, education,

⁴⁶*Id.* (The American Red Cross adopted a method whereby donors could call the center after donation to indicate whether their blood should be used for transfusion.)

⁴⁷*Id.*

⁴⁸Miller, *supra* note 23, at 3421.

⁴⁹Levine & Bayer, *Screening Blood: Public Health and Medical Uncertainty*, 1985 HASTINGS CENTER REP. SPECIAL SUPPLEMENT 8.

⁵⁰*Id.*

⁵¹Wallis, *supra* note 33, at 44 (accuracy reported by the National Institutes for Health).

⁵²Levine & Bayer, *supra* note 49, at 8.

⁵³*Questions and Answers*, *supra* note 32, at 1.

⁵⁴Miller, *supra* note 23, at 3419.

⁵⁵Krim, *supra* note 3, at 2.

⁵⁶Wallis, *supra* note 33, at 47 (statement of William Haseltine, M.D., affiliated with Harvard University's Dana-Farbour Cancer Institute). See also Krim, *supra* note 3, at 4-5.

⁵⁷Krim, *supra* note 3, at 2-7 (Although the mortality rate has thus far been 47 percent, the "case fatality rate — the likelihood that any given patient will die of AIDS — is 100 percent.") *Id.* at 6.

and housing."⁵⁸ The characteristics of the disease, compounded by the reaction of society, clearly complicate the judicial process in AIDS-related lawsuits. The intricacy of the situation was aptly described in a recent discussion of transfusion transmission liability:

Despite common law precedents governing contaminated blood, there is no predetermined common law rule or formula that can be applied per se to AIDS lawsuits with a reasonably clear result. The AIDS issue is framed in medical, ethical, and political considerations and questions. It involves the politics of multiple advocacies.⁵⁹

Rasmussen, one of the first published cases addressing AIDS,⁶⁰ presents one court's approach to the multifaceted issues the disease presents.

III. *South Florida Blood Service, Inc. v. Rasmussen*

Donald Rasmussen, while sitting on a bus bench, was struck and seriously injured by a hit and run driver who was leaving the scene of a prior accident.⁶¹ Thereafter, Rasmussen was hospitalized for his injuries. In the course of medical treatment, he received fifty-one units of blood.⁶² Subsequently, Rasmussen was diagnosed as having AIDS, which, "in all medical probability," was contracted through one of the transfusions necessitated by his injuries.⁶³ That disease ultimately caused his death.⁶⁴

In the suit against the hit and run driver, Rasmussen⁶⁵ sought to discover the names and addresses of the blood donors in order to prove aggravation of injuries.⁶⁶ Served with a subpoena duces tecum,⁶⁷ non-party South Florida Blood Service, Inc. (South Florida), the blood supplier, refused to comply with discovery. Thereafter, South Florida moved to quash the subpoena, or for a protective order, claiming that

⁵⁸467 So. 2d at 800.

⁵⁹Miller, *supra* note 23, at 3419-20.

⁶⁰In the first published decision addressing AIDS, *LaRocca v. Dalsheim*, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983), the court held that removal of AIDS victims from the prison was not justified because precautions were taken to prevent transmission of the disease to other prisoners.

⁶¹Appellant's Brief, *supra* note 12, at 4.

⁶²*Rasmussen*, 467 So. 2d at 800.

⁶³*Id.* at 801 n.6.

⁶⁴Appellant's Brief, *supra* note 12, at 4.

⁶⁵Although the plaintiff was deceased at the time of the *Rasmussen* decision, the court referred to the party seeking discovery as Rasmussen. For clarity, the same reference will be used in this Note. See *Rasmussen*, 467 So. 2d at 800 n.2.

⁶⁶*Id.* at 800.

⁶⁷*Id.* Rasmussen requested "any and all records, documents and other material indicating the names and addresses of the blood donors" whose blood Rasmussen received. *Id.*

Rasmussen had shown neither good cause nor justifiable reason for the release of the "confidential" information.⁶⁸ The trial court denied the motion, and a petition for certiorari followed.⁶⁹

The Florida Court of Appeals initially recognized Florida's liberal discovery rules which allow for the discovery of any non-privileged matter which is relevant to the lawsuit.⁷⁰ The court further noted that it had the power, pursuant to the rules of discovery, and on the showing of good cause, to limit or prohibit discovery which would cause embarrassment, oppression, harassment, or undue invasion of privacy.⁷¹ "In deciding whether good cause has been shown," the court stated, "it is necessary to balance the competing interests that would be served by the granting or denying of discovery."⁷² The court identified the relevant interests as: (1) the plaintiff's interest in pursuing meaningful discovery to receive full compensation for his injuries; (2) the donors' interest in maintaining their constitutional right to privacy in the nondisclosure of personal matters; and (3) the societal and institutional interest in maintaining an adequate and healthy national blood supply.⁷³

Ultimately, the *Rasmussen* court decided that the interests of the donors, the blood organizations, and society combined to outweigh the plaintiff's interest in pursuing meaningful discovery.⁷⁴ The details of the majority's reasoning in *Rasmussen* will be discussed in the following analysis of whether the issue was properly decided.

IV. THE BALANCING OF THE INTERESTS

A. *The Plaintiff's Interest: Aggravation of Injuries*

The plaintiff's interest in a case like *Rasmussen*, proving aggravation of injuries⁷⁵ is the most evident and undisputed interest involved. In fact, it is the only interest upon which the court's decision will have an unequivocal result. If discovery is denied, the plaintiff can proceed no further in his pursuit of meaningful discovery. The effect of such a premature halt in discovery will leave the plaintiff unable to prove causation or refute the defendant's claim that the disease was contracted through other means.⁷⁶

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* at 801. ("Florida Rule of Civil Procedure 1.280 allows for discovery of any matter, not privileged, that is relevant to the subject matter of the action.")

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 801-04.

⁷⁴*Id.* at 804.

⁷⁵See *supra* note 5.

⁷⁶Appellant's Brief, *supra* note 12, at 2. It stated: Rasmussen's need for the discovery is absolute. Defendants below are vigorously attempting to prove an alternative source of Rasmussen's affliction. They have

It has long been a precept of tort law that a tortfeasor may be held liable for foreseeable aggravation of the injuries that he caused.⁷⁷ This doctrine operates to hold the tortfeasor liable for negligent medical treatment of the plaintiff's injuries.⁷⁸ According to Prosser, "Where the injured plaintiff subsequently contracts a disease, similar principles are applied. If the injury renders the plaintiff particularly susceptible to the disease, . . . there is little difficulty in holding the defendant [liable] for the consequences of the disease and its treatment."⁷⁹ Therefore, a plaintiff such as Rasmussen has the right to recover fully for the actions of the tortfeasor, including recovery for the development of AIDS which caused his death, if and only if he can prove that he contracted the disease through the blood necessitated by his injuries.⁸⁰

Such a plaintiff also has the right to discover "any matter, not privileged, that is relevant to the subject matter of the action."⁸¹ Because the most predictable defense to an aggravation of injury claim would be to assert that the plaintiff acquired the disease through another source,⁸² the plaintiff must obtain discovery of the donors' identities in order to refute that defense. Thus, the plaintiff's need for the information is two-fold: it is necessary to prove one element of his *prima facie* case, causation, and to defeat the defense of infection from an alternate source.

attempted to show him to be an intravenous drug abuser and homosexual. They also rely heavily on the South Florida Blood Service's voluntary statement of "fact" that none of Rasmussen's donors have become victims of AIDS. Plaintiff's primary source of contrary evidence begins with the discovery of the names and addresses of his donors.

Id. This portion of the appellant's brief was stricken because the Florida Court of Appeals had not considered the information. Telephone conversation with George Bender, attorney for Rasmussen, April 25, 1986.

⁷⁷W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 309-10 (5th ed. 1984).

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰Appellant's Brief, *supra* note 12, at 6 ("Full recovery for Rasmussen's death against the defendants below will . . . turn on the answer to a single question: What was the source of Rasmussen's AIDS?").

⁸¹FLA. R. CIV. P. 1.280. The Florida discovery rule is similar to the federal rule. See FED. R. CIV. P. 26(b).

⁸²See *Rasmussen*, 467 So. 2d at 805 (Schwartz, C.J., dissenting), wherein the dissent maintained:

Treating first the *plaintiff's* interest in securing the information in question, it must be emphasized — although the court does not mention the fact — that the defendant below apparently on the ground that Rasmussen may himself have been a member of a "high risk" group, severely contests the fact that he acquired AIDS in the blood transfusion process. Thus, far from a matter of purely tangential concern . . . it is of absolute necessity to his and his survivors' right and ability to recover that they secure information that one or more of the donors is suffering from or is a potential carrier of the lethal affliction.

(footnote omitted).

The plaintiff's interest in discovery, briefly discussed in *Rasmussen*, was conceded to be "legitimate."⁸³ However, the court stated that the weight of the plaintiff's interest was tempered by the possibility that any evidence discovered would have "questionable" probative force.⁸⁴ The court based this conclusion on two facts: first, according to South Florida, none of the donors had been diagnosed as having AIDS, and second, even if the donors, or one of them, was determined to be at high risk to develop AIDS, that fact would not confirm that one of them had transmitted the disease.⁸⁵

The court's reasoning illustrates why the disease process itself must be thoroughly understood before the legal issues arising therefrom can be appreciated. It is well established that a person may carry and transmit the AIDS virus without ever developing the disease.⁸⁶ It is further known that a person exposed to AIDS may develop the disease many years after exposure.⁸⁷ The "fact" that none of the donors has been diagnosed as having AIDS is, therefore, of tenuous probative value. Moreover, if medical science accepts and asserts the fact that certain groups of individuals are more likely than not to develop AIDS,⁸⁸ the establishment of the fact that one or more donors had characteristics indicative of these high-risk groups does have probative value. There is, of course, no doubt as to the probative force of discovering that one of the donors had AIDS or died therefrom, a possibility not considered by the *Rasmussen* court.

In concluding its discussion of the plaintiff's interest, the *Rasmussen* court stated, "[s]ince the probative value of the evidence which might be discovered is questionable, Rasmussen's interest in the information is slight when compared with the opposing interests which we now discuss."⁸⁹ The significance of Rasmussen's interest, therefore, was discounted from the outset of the balancing test.

B. The Societal and Institutional Interest in Maintaining an Adequate and Healthy National Blood Supply

South Florida, which asserted the interests of the blood organizations, the donors, and society, contended that the precedential effect of *Rasmussen*, should discovery be allowed, would compromise the national blood supply.⁹⁰ This argument, based in part on a series of predictions,

⁸³467 So. 2d at 801.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 805 n.1 (Schwartz, C.J., dissenting).

⁸⁷See Krim, *supra* note 3, at 5.

⁸⁸See Goldsmith, *supra* note 1, at 3369 (homosexual and bisexual men, hemophiliacs, and intravenous drug abusers are at high risk to develop AIDS).

⁸⁹467 So. 2d at 801.

⁹⁰*Id.* at 804.

proceeded as follows. Initially, South Florida asserted that the twin aims of all national blood suppliers — providing blood which is both adequate in amount and free from disease — depends on the maintenance of an all volunteer donation system.⁹¹ Such a system, which the National Blood Policy advocates,⁹² provides blood less likely to be contaminated with infectious disease than that which is received from paid donors. Because the majority of AIDS victims are homosexuals or intravenous drug abusers, and because the plaintiff sought to show that one of the donors had AIDS at the time of donation or was at high risk to develop the disease, South Florida assumed that the plaintiff's only possible use of the information would necessarily entail probing into the intimate details of the donors' lives.⁹³ The fear of such intrusive questioning, South Florida predicted, would inhibit prospective donors from donating blood and, therefore, compromise the national blood supply.⁹⁴

South Florida was not alone in its assertion. The Council of Community Blood Centers (CCBC), "a national association of independent, non-profit regional and community blood centers operating in 33 states across the nation,"⁹⁵ and the American Blood Commission (ABC), "a non-governmental organization established to help assure all the people of the nation of a safe and adequate supply of blood and blood components,"⁹⁶ joined South Florida as amicus curiae opponents to discovery in the *Rasmussen* case.⁹⁷ An historical perspective of the national blood organizations lends clarity to their position in a case like *Rasmussen*.

In 1975, the federal government voiced its concern for the establishment and maintenance of a safe and adequate national blood supply by issuing the National Blood Policy (NBP).⁹⁸ It encouraged an all-voluntary donation system in order to meet the policy goals of quality, accessibility, efficiency, and maintenance of an adequate blood supply.⁹⁹ Despite the fact that the NBP was never enacted, it "became the focal point around which blood banking policy has evolved over the last decade."¹⁰⁰

⁹¹*Id.*

⁹²*Id.*

⁹³See *infra* note 213.

⁹⁴467 So. 2d at 804.

⁹⁵Brief for Amicus Curiae Appellee Council of Community Blood Centers at 5, *South Florida Blood Service, Inc. v. Rasmussen*, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985) [hereinafter cited as Brief for CCBC]. See also *Rasmussen*, 467 So. 2d at 801.

⁹⁶See Brief for Amicus Curiae Appellee American Blood Commission at 1, *Rasmussen v. South Florida Blood Service, Inc.*, No. 84-1403 (filed Aug., 1985) [hereinafter cited as Brief for ABC].

⁹⁷The ABC joined as amicus curiae appellee on the appeal to the Florida Supreme Court.

⁹⁸O.T.A., *supra* note 44, at 3.

⁹⁹*Id.*

¹⁰⁰*Id.*

Originally formed to implement the NBP,¹⁰¹ the ABC has coordinated the endeavors of the nation's three major blood suppliers:¹⁰² the American Red Cross (ARC), the CCBC, and the American Association of Blood Banks (AABB).¹⁰³ Through the efforts of these blood organizations and the ABC, the voluntarily-donated portion of the national blood supply increased from 89 percent in 1971 to 97.8 percent in 1980.¹⁰⁴ Because donated blood has less chance of infection with disease than blood that is purchased,¹⁰⁵ the result of this increase in voluntary donations is a healthier blood supply.

With the advent of AIDS, the blood organizations face a new issue: the impact that the disease will have on the collection and use of blood and blood products.¹⁰⁶ A 1985 Blood Policy and Technology Report recognized this as a pressing issue.¹⁰⁷ This report also recognized a related issue: "[S]hould the names of AIDS patients be made available, to what extent, and to whom?"¹⁰⁸

It is precisely these two issues which will surface in cases like *Rasmussen*. South Florida, the ABC, and the CCBC urged that the release of the donors' names be disallowed in order to prevent endangering the national blood supply.¹⁰⁹ They cited their efforts of the past ten years in the development of a nearly all-voluntary donation system and asserted that allowing discovery would decrease such donations.¹¹⁰ The organizations further noted the general reluctance of individuals to donate blood, despite the fact that the donation process involves no more than approximately forty-five minutes.¹¹¹ The reluctance to donate has traditionally been attributed to fear — of the needle, of pain, and of unspecified consequences.¹¹² Currently, because of a lack of public awareness, many people refuse to donate on the erroneous assumption that they may contract AIDS through donation alone.¹¹³ The organizations contended that to add the fear of later identification and questioning to

¹⁰¹*Id.*

¹⁰²*Id.* at 3-4.

¹⁰³*Id.*

¹⁰⁴*Id.* at 5.

¹⁰⁵See *Rasmussen*, 467 So. 2d at 804.

¹⁰⁶O.T.A., *supra* note 44, at 12.

¹⁰⁷*Id.* at 1.

¹⁰⁸*Id.* at 16.

¹⁰⁹*Rasmussen*, 467 So. 2d at 804; Brief for ABC, *supra* note 96, at 3; Brief for CCBC, *supra* note 95, at 5; Brief for Appellee South Florida Blood Service at 6, *South Florida Blood Service, Inc. v. Rasmussen*, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985) [hereinafter cited as Brief for SFBS].

¹¹⁰See *supra* note 109.

¹¹¹Brief for CCBC, *supra* note 95, at 7.

¹¹²*Id.* at 19.

¹¹³*Id.* at 17.

this multitude of public concerns would inhibit prospective donors to the point of depleting the voluntary sector of the blood supply.¹¹⁴

Notwithstanding the merit of this argument at the time of the appellate court decision in *Rasmussen*, its current force, in light of the development of a highly accurate test for the detection of the AIDS antibody in donated blood, is virtually insignificant. The HTLV-III test for AIDS antibodies was declared 99.8 percent accurate after five months of use.¹¹⁵ Such a high degree of accuracy means, in effect, that *at least* 99.8 percent of the AIDS-contaminated blood will be diverted from the national bloodstream *at the time of donation*. The threat of later questioning by a plaintiff like *Rasmussen*, therefore, will be virtually non-existent.

Arguably, the blood organizations could assert that donors may fear that they will fall into the 0.2 percent of AIDS-infected blood which may slip through the system undetected. However, this is a balancing process which the courts must undertake; remoteness of degree is properly assessed in such a process.¹¹⁶ The minute possibility of later questioning must be outweighed by the plaintiff's unequivocal need for discovery.

C. The Donors' Interest: The Constitutional Right to Privacy

In *Rasmussen*, South Florida, the CCBC, and the ABC asserted that blood donor records are protected by the constitutional right to privacy in the nondisclosure of personal matters.¹¹⁷ They further asserted that the release of the donors' identities, coupled with the anticipated use of the information, could only lead to a violation of the donors' right to privacy.¹¹⁸

¹¹⁴Brief for ABC, *supra* note 96, at 3; Brief for CCBC, *supra* note 95, at 16-20; Brief for SFBS, *supra* note 109, at 6.

¹¹⁵See Marwick, *supra* note 14, at 1681-83. In a recent meeting of the National Institutes of Health, the Food and Drug Administration, and the Centers for Disease Control, the implications of the HTLV-III test were discussed. As one CDC official stated:

[The findings of studies] clearly demonstrate the screening test is valid for antibody. We have found that in a group of blood donors — persons at low risk of HTLV-III exposure and with a low prevalence of infection — and in a group of gay men who are at high risk of HTLV-III exposure and with a high prevalence of infection with HTLV-III, that the test is highly specific. It correctly identifies those in both groups who had a high probability of infection.

Id. at 1683. Noted as a "tremendous accomplishment" in the halt of transfusion transmission of AIDS, the test has gained the support of the leading national health agencies and blood organizations. *Id.*

¹¹⁶See *infra* notes 153-58 and accompanying text.

¹¹⁷See *Rasmussen*, 467 So. 2d at 801. See also Brief for ABC, *supra* note 95, at 13-7.

¹¹⁸See Brief for ABC, *supra* note 96, at 7; Brief for CCBC, *supra* note 95, at 13-14; Brief for SFBS, *supra* note 109, at 6. It should be noted that South Florida did not feel constrained to protect the rights of its donors when it released to the defendants in

The *Rasmussen* court initially identified two recognized zones of privacy:¹¹⁹ (1) the zone encompassing the right to autonomous decision making, typified by cases such as *Roe v. Wade*¹²⁰ and its progeny; and (2) the zone encompassing "the interest in avoiding disclosure of personal matters," recognized in cases such as *Whalen v. Roe*.¹²¹ Immediately looking to Rasmussen's potential use of the donors' identities, the court stated:

It is evident Rasmussen needs more than just the names and addresses of the donors. His interest is in establishing that one or more of the donors has AIDS or is in a high risk group. Because the groups at highest risk are homosexuals, bisexuals, intravenous drug users and hemophiliacs, it is obvious that Rasmussen would have to probe into the most intimate details of the donors' lives, including their sexual practices, drug use and medical histories. Both the courts and the legislature have recognized these areas as sanctuaries of privacy entitled to protection.¹²²

Ultimately, the court concluded that Rasmussen's anticipated use of the information, along with the potential "oppressive effects of possible disclosure outside the litigation," amounted to an interest falling within the disclosural right to privacy.¹²³

Thereafter, the *Rasmussen* court adopted a balancing test as the appropriate means by which to assess the competing interests of the donors' privacy and the state's interest "in fair and efficient resolution of disputes."¹²⁴ The weight of the state's interest, the court explained,

Rasmussen the identities of individuals who donated blood to the plaintiff following his initial hospitalization. See Appellant's Brief, *supra* note 12, at 2.

Donors' names and addresses have been produced in the past by blood banks in Florida and the South Florida Blood Service in particular. In this very litigation blood banks, including the South Florida Blood Service have produced to defendants below names and addresses of donors of blood received by Rasmussen without objection.

Id. This portion of the appellant's brief was stricken because the Florida Court of Appeals had not considered the information. Telephone conversation with George Bender, attorney for Rasmussen, April 25, 1986.

The doctrine of waiver, which is beyond the scope of this Note, may apply in cases like *Rasmussen* where the blood bank has released its donor records to other litigants. *E.g.*, *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir. 1984) ("protection from disclosure is available only when the party asserting a privilege has maintained confidentiality") (footnote omitted).

¹¹⁹467 So. 2d at 802.

¹²⁰410 U.S. 113 (1973).

¹²¹429 U.S. 589 (1977).

¹²²*Rasmussen*, 467 So. 2d at 802. *But see* Miller, *supra* note 23, at 3421 (The American Red Cross questions blood donors about the use of intravenous drugs.).

¹²³*Rasmussen*, 467 So. 2d at 802.

¹²⁴*Id.* at 803.

is proportional to the relevancy and necessity of the requested information to the disposition of the lawsuit.¹²⁵ Despite Florida's liberal discovery policy and the fact that the information was relevant and vital to the resolution of Rasmussen's wrongful death claim, the court held that the donors' privacy rights, combined with the societal and institutional interest in maintaining "the free flow of donated blood," outweighed the interests of Rasmussen and the state.¹²⁶

1. *Judicial Interpretation of the Constitutional Right to Privacy.* — Although there is no express constitutional right to privacy,¹²⁷ the Supreme Court has identified a right to privacy in relation to explicit and implied constitutional guarantees. Some of the explicit guarantees which have been interpreted to give rise to a right to privacy include privacy in one's associations as guaranteed by the first amendment,¹²⁸ privacy in relation to unrestricted reading in one's home as guaranteed by the first and fourteenth amendments,¹²⁹ and privacy as guaranteed by the fourth amendment's prohibition against unreasonable searches and seizures.¹³⁰

The Supreme Court initially identified an implied right to privacy in *Griswold v. Connecticut*.¹³¹ In that case, the Court recognized a privacy right for which no specific constitutional guarantee existed — the right of married persons to use contraceptives. The right to privacy in marital decisions involving contraception, the Court explained, emanates from the "penumbras" surrounding the specific guarantees in the Bill of Rights.¹³² More simply stated, "various guarantees create zones of privacy."¹³³ Because the marital association concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees, the Court held the Connecticut statute, which invaded that privacy zone, unconstitutional.¹³⁴

Since *Griswold*, the parameters of the right to privacy have been tested:

[From the time of *Griswold*] American constitutional lawyers and scholars have been probing for the shape and boundaries of that evanescent and floating notion: privacy. The protections comprehended by that term have been variously grounded in the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments.

¹²⁵*Id.*

¹²⁶*Id.* at 804.

¹²⁷See *Whalen v. Roe*, 429 U.S. at 607 (Stewart, J., concurring).

¹²⁸See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

¹²⁹*Stanley v. Georgia*, 394 U.S. 557 (1969).

¹³⁰*Katz v. United States*, 389 U.S. 348 (1967).

¹³¹381 U.S. 479 (1965).

¹³²*Id.* at 484.

¹³³*Id.*

¹³⁴*Id.* at 485-86.

While most recently these "rights of privacy" have found anchorage as a portion of liberty protected by the due process clauses, their precise scope remains uncertain, still in the stage of exploration.¹³⁵

Although the parameters of the constitutional right to privacy remain obscure, its application has been limited to protecting only rights so personal that they are "fundamental" or "implicit in the concept of ordered liberty."¹³⁶ The Supreme Court has defined fundamental rights as those involving marital activities, procreation, family relationships, child rearing and education, and contraception.¹³⁷

In *Rasmussen*, the plaintiff sought to discover only the names and addresses of the blood donors.¹³⁸ The court, looking immediately to the anticipated use of the requested information, held that blood donors' identities are protected by the disclosural right to privacy.¹³⁹ In order to balance more precisely the donors' rights against those of the plaintiff, however, it is necessary to recognize that the right to disclosural privacy asserted in *Rasmussen* is two dimensional. First, the right to nondisclosure of blood donors' names entails a right to anonymity. Second, the right to nondisclosure of the intimate details of one's sexual, medical, and drug use histories entails a right to keep intimate facts private. In order to obtain constitutional protection on either dimension, the requested information must constitute facts so personal that they are "implicit in the concept of ordered liberty."¹⁴⁰ The primary issue for resolution, then, is the scope of the disclosural right to privacy.

2. *The Disclosural Right to Privacy.* — Since its decision in *Griswold*, the Supreme Court has frequently alluded to the disclosural right to privacy without ruling on it.¹⁴¹ For example, in *Planned Parenthood of Central Missouri v. Danforth*,¹⁴² the Court sustained the validity of maintaining abortion records because they served a valid purpose and because there was no evidence that the information would be misapplied.¹⁴³ Similarly, in *Nixon v. Administrator of General Services*,¹⁴⁴ the

¹³⁵J. Torke, *Constitutional Law, Judicial Review and Private Morality* 2 (1983) (unpublished material).

¹³⁶*Roe v. Wade*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹³⁷*Id.*

¹³⁸467 So. 2d at 801.

¹³⁹*Id.* at 804.

¹⁴⁰See *supra* note 136 and accompanying text.

¹⁴¹J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 761 n.22 (2d ed. 1983). See also Brief for Amicus Curiae Appellant Miami Herald Publishing Co. at 7, *Rasmussen v. South Florida Blood Service, Inc.*, No. 67,081 (filed Aug. 1985) [hereinafter cited as Brief for Miami Herald].

¹⁴²428 U.S. 52 (1976).

¹⁴³*Id.*

¹⁴⁴433 U.S. 426 (1977).

Court held that, even assuming a right to privacy existed, that right was outweighed by the national interest in archiving the presidential records.¹⁴⁵ A variety of state courts have followed suit in their interpretation of the disclosural right to privacy.¹⁴⁶

The *Rasmussen* court relied upon *Whalen v. Roe* for the existence of the disclosural right to privacy.¹⁴⁷ In *Whalen*, the Supreme Court noted that the case law recognizes two types of privacy interests — nondisclosure of personal information and autonomy in decision making.¹⁴⁸ A closer look at *Whalen*, however, reveals that although the Court stated that in some circumstances “[the] duty . . . to avoid unwarranted disclosures [of data compiled for public purposes] . . . arguably has its roots in the Constitution,” it did not reach the merits of the constitutional issue.¹⁴⁹

In *Whalen*, the propriety of a New York statute requiring recordation of the identities of individuals receiving Schedule II drug prescriptions was challenged as violative of both the disclosural and decision-making privacy zones.¹⁵⁰ The appellant physicians and patients contended that the recording and storing of information concerning individuals’ drug use “creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations.”¹⁵¹ Such threat of reputational harm, the appellants asserted, would make physicians hesitant to prescribe needed drugs and patients hesitant to pursue health care.¹⁵²

The Supreme Court, however, found no indication that the statute’s security measures would not be enforced.¹⁵³ Although the Court recognized that the data could be exposed in litigation over improper prescribing, it rejected that basis for disqualification of the recording system.¹⁵⁴ Such a “remote possibility that judicial supervision of the

¹⁴⁵*Id.*

¹⁴⁶*See, e.g.,* *Chidester v. Needles*, 353 N.W.2d 849, 853 (Iowa 1984) (patients’ qualified privacy interest in their medical records must yield to the state’s interest in the administration of criminal justice); *Denoncourt v. Commonwealth, State Ethics Comm’n*, 470 A.2d 945, 949 (Pa. 1983) (“government’s intrusion into a person’s private affairs is constitutionally justified when the government interest is significant and there is no alternate reasonable method of lesser intrusiveness”) (footnotes omitted); *In re June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d 73, 77 (Pa. 1980) (held that because the court could take necessary precautions to ensure confidentiality if the patient tissue reports were adduced at trial, production of those reports did not violate the federal or Pennsylvania constitutions). *See also infra* note 167.

¹⁴⁷467 So. 2d at 802.

¹⁴⁸*Whalen*, 429 U.S. at 599.

¹⁴⁹*Id.* at 605-06.

¹⁵⁰*Id.* at 599-600.

¹⁵¹*Id.* at 600.

¹⁵²*Id.*

¹⁵³*Id.* at 600-01.

¹⁵⁴*Id.* at 601-02.

evidentiary use of particular . . . information will provide inadequate protection against unwarranted disclosures," the Court stated, was insufficient to invalidate the program.¹⁵⁵ The fact that the information would, by definition, be disclosed to the Board of Health, the Court stated, was analogous to

a host of other unpleasant invasions of privacy that are associated with many facets of health care [D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.¹⁵⁶

Ultimately, the *Whalen* Court held that neither the instant nor the remote menace of unwarranted disclosure posed by the recording system was adequate to invalidate the statute on fourteenth amendment grounds.¹⁵⁷ The Court specifically reserved judgment on privacy issues related to the unauthorized exposure of collections of private data, whether or not the exposure was intentional.¹⁵⁸

The Supreme Court also addressed the disclosural right to privacy in *Paul v. Davis*.¹⁵⁹ The plaintiff in *Paul* had been arrested for shoplifting. After publication and distribution of a police report labeling the plaintiff as a shoplifter, the charges were dropped. Davis filed suit under section 1983 of Title 42,¹⁶⁰ alleging a violation of rights guaranteed by the first, fourth, fifth, ninth, and fourteenth amendments.¹⁶¹

In its discussion of the plaintiff's claim of denial of due process, the Court described Davis' interest as one "in reputation alone."¹⁶² Such an interest, the Court held, could not find protection in the Due Process Clause.¹⁶³ Specifically in relation to the multi-amendment privacy claim,

¹⁵⁵*Id.*

¹⁵⁶*Id.* at 602.

¹⁵⁷*Id.* at 603-04.

¹⁵⁸*Id.* at 605-06.

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks. . . . The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. . . . [We] do not [today] decide any question which might be presented by the unwarranted disclosure of accumulated private data — whether intentional or unintentional

Id.

¹⁵⁹424 U.S. 693 (1976).

¹⁶⁰42 U.S.C. § 1983 (1982).

¹⁶¹424 U.S. at 694.

¹⁶²*Id.* at 711-12.

¹⁶³*Id.* at 712.

the Court noted that a reputational interest was far removed from the areas it considered entitled to privacy.¹⁶⁴ The Court stated:

[Davis] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is [not] based upon any challenge to the state's ability to restrict his freedom of action in a sphere contended to be "private" None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.¹⁶⁵

Because the personal privacy right claimed by the plaintiff was not "implicit in the concept of ordered liberty," the Court denied it constitutional protection.¹⁶⁶

Because the Supreme Court has recognized the disclosural right to privacy but never upheld it, the boundaries of that right remain obscure. As stated by Justice Stewart in his *Whalen* concurrence, the Constitution provides no general right to privacy.¹⁶⁷ The protection of the right to be "left alone," the Justice stated, remains with the states.¹⁶⁸

3. *The Right to Anonymity.* — As stated previously, the interest in nondisclosure of only the blood donors' identities is essentially an interest in anonymity. The Supreme Court has not addressed the precise issue of whether the disclosure of identity alone may be constitutionally prohibited.¹⁶⁹ Applying the Supreme Court's general test for privacy, however, the donors' names and addresses are protected from disclosure

¹⁶⁴*Id.*

¹⁶⁵*Id.* at 713.

¹⁶⁶*Id.*

¹⁶⁷429 U.S. at 607 (Stewart, J., concurring). It is interesting to note that in 1984, the Florida Supreme Court stated that "there is . . . no per se federal constitutional right to disclosural privacy." *Rasmussen* did not discuss this case. See *Forsberg v. Hous. Auth.*, 455 So. 2d 373, 374 (Fla. 1984) (per curiam).

¹⁶⁸*Whalen*, 429 U.S. at 608 (Stewart, J., concurring).

¹⁶⁹A variety of lower federal courts have addressed the issue of whether individuals' identities alone may be disclosed. See, e.g., *Payne v. Howard*, 75 F.R.D. 465 (D.D.C. 1977) (defendant dentist ordered to release names of nonparty former patients to plaintiff so that the plaintiff could obtain the former patients' consent to release of their medical records); *Lincoln American Corp. v. Bryden*, 375 F. Supp. 109 (D. Kan. 1973) (plaintiff's interest in discovering stockholders' names outweighed legislative policy of maintaining the confidentiality of stockholder lists because the information was relevant to the plaintiffs' claims and the court used its discretionary power to limit the scope of the plaintiffs' discovery); *Connell v. Washington Hosp. Center*, 50 F.R.D. 360 (D.D.C. 1970) (despite the defendant/hospital's contention that release of nonparty former patients' names could lead to disclosures that the patients were treated for venereal disease or sexual aberrations, the plaintiffs were entitled to discover the former patients' identities for three reasons: (1) the plaintiffs needed the testimony of former patients to proceed in their negligence suits; (2) the hospital had an undue advantage because it could contact former patients to help defend the lawsuits; and (3) the names disclosed in discovery were protected by an absolute privilege).

only if that information implicates "fundamental" rights.¹⁷⁰ Because one's name is far removed from the personal areas defined as fundamental,¹⁷¹ it is unlikely that any court would invoke the Constitution to protect merely the identities of voluntary blood donors.

Aside from the privacy decisions of the United States Supreme Court, the opponents to discovery in *Rasmussen* argued that "in tissue donation cases, the donor's right to privacy has been found to extend to the donor's identity."¹⁷² *Head v. Colloton*,¹⁷³ the only reported case addressing the issue of whether a donor's identity may be discovered, at first glance appears to support nondiscovery in a case such as *Rasmussen*. However, that case and its holding must be limited to its specific fact situation.

In *Head*, the plaintiff sought to discover the name of a woman who had undergone compatibility testing to donate bone marrow to a member of her family. Without the donor's consent or knowledge, the hospital placed her name on its registry of potential donors for use in an experimental donation program. Thereafter, the plaintiff learned of the donor's existence and sought to discover her name in order to solicit a donation for his own use. After the donor informed the hospital that she was not interested in making a donation, the plaintiff sought to compel discovery so that he could personally pursue the matter.¹⁷⁴ The court denied discovery.¹⁷⁵

On these facts alone, this situation differs greatly from one where a plaintiff has received the blood of a voluntary donor and has died as a result. Moreover, the *Head* court was referring to a potential donor, whom the plaintiff, a member of the general public, wished to contact to solicit a bone marrow donation.¹⁷⁶ In a case like *Rasmussen's*, the link is much closer than that between a potential donor who does not wish to donate and an unknown member of the general public; one of the donors in *Rasmussen's* case has voluntarily donated his or her blood, which, "in all medical probability," passed to the plaintiff the disease which ended his life.¹⁷⁷

Aside from the disparity in facts, the *Head* case was decided solely on state statutory grounds.¹⁷⁸ Although the *Head* court noted the con-

¹⁷⁰See *supra* text accompanying notes 136-37.

¹⁷¹*Id.*

¹⁷²Brief for CCBC, *supra* note 95, at 13 (citing *Head v. Colloton*, 331 N.W.2d 870 (Iowa 1983)).

¹⁷³331 N.W.2d at 870.

¹⁷⁴*Id.* at 873.

¹⁷⁵*Id.* at 877.

¹⁷⁶*Id.* at 873.

¹⁷⁷See *supra* text accompanying note 63.

¹⁷⁸Discovery was denied on the basis of Iowa's public records statute. 331 N.W.2d at 876 (citing IOWA CODE § 68A.7(2) (1973)).

stitutional right to privacy and stated that the right could be as "important to a potential donor as to a person in ill health,"¹⁷⁹ its decision was not constitutionally based. When viewed in light of its specific facts and holding, the *Head* case offers little guidance to a court considering the claim of a blood donor's constitutional right to remain anonymous.¹⁸⁰

4. *The Right to Nondisclosure of Personal Information.* — In *Rasmussen*, the court concluded that information concerning one's sexual, medical, and drug use histories falls within "sanctuaries of privacy entitled to protection."¹⁸¹ On this basis, and on the possibility that disclosure outside of the litigation could lead to donor discrimination and embarrassment, the court held that the donors' identities were protected by the disclosural right to privacy.¹⁸² To support its holding that personal information regarding sexual and drug use histories is privileged, the *Rasmussen* court cited three federal court decisions: *Priest v. Rotary*,¹⁸³ *Lampshire v. Procter & Gamble Co.*,¹⁸⁴ and *Plante v. Gonzalez*.¹⁸⁵

In *Priest*, the plaintiff alleged employment discrimination in the form of sexual harassment.¹⁸⁶ In order to support his defense that the plaintiff was attempting to "pick up" male customers while on duty, the employer-defendant sought to discover the identities of the plaintiff's sexual partners for the previous ten years.¹⁸⁷ Through this information, the defendant hoped to reveal evidence of habit, motive, or intent, which would be admissible under exceptions to the rule prohibiting the use of character evidence.¹⁸⁸ The *Priest* court denied discovery for three reasons. First, despite the defendant's contentions to the contrary, the information was

¹⁷⁹331 N.W.2d at 876.

¹⁸⁰In *Bishop Clarkson Memorial Hosp. v. Reserve Life Ins. Co.*, 350 F.2d 1006 (8th Cir. 1965), the court addressed the question whether a hospital could withhold records of patient-policyholders from an insurance company when the patients had consented to the inspection. The court held that the hospital could not withhold the records. This decision was based in part on the fact that because Nebraska law required hospitals to maintain patient records, the records were "quasi-public." "[Quasi-public] records . . . may be inspected by any person having an 'interest such as would enable him to maintain or defend an action for which the . . . record sought can furnish evidence or necessary information.'" *Id.* at 1011 (quoting *Pyramid Life Ins. Co. v. Masonic Hosp. Ass'n of Payne County, Okla.*, 191 F. Supp. 51, 54 (W.D. Okla. 1961)). *Accord* *Connell v. Washington Hosp. Center*, 50 F.R.D. 360 (D.D.C. 1970). Blood donor records may be obtainable as "quasi-public" records because blood banks are required by federal law to maintain donor records. *See* Add'l Standards for Human Blood and Blood Products, 21 C.F.R. 640.4(e), 640.64(d), 640.72(a)(2) (1985).

¹⁸¹467 So. 2d at 802.

¹⁸²*Id.* at 804.

¹⁸³98 F.R.D. 755 (N.D. Cal. 1983).

¹⁸⁴94 F.R.D. 58 (N.D. Ga. 1982).

¹⁸⁵575 F.2d 1119 (5th Cir. 1978).

¹⁸⁶*Priest*, 98 F.R.D. at 756.

¹⁸⁷*Id.*

¹⁸⁸*Id.* at 758 (citing FED. R. EVID. 404, 406).

sought to prove that the plaintiff acted in conformity with past behavior.¹⁸⁹ Second, the probative value of the information was marginal.¹⁹⁰ Third, the discovery may have been pursued with the intent to discourage the plaintiff from prosecuting her Title VII¹⁹¹ lawsuit.¹⁹² In a case like *Rasmussen*, none of the *Priest* bases for denying discovery is present. The information is extremely relevant to the proposition that the plaintiff contracted AIDS through a blood transfusion,¹⁹³ the use of the information is not proscribed by the procedural rules, and the plaintiff has no ulterior motive to inhibit a lawsuit. Furthermore, the evidence sought to be discovered would not be offered to impinge the character of the blood organization or the blood donors.

In *Lampshire*, also relied upon by the *Rasmussen* majority, the plaintiff intended to support her products liability claim with the results of a CDC study on Toxic Shock Syndrome (TSS).¹⁹⁴ The defendant opposed the use of the TSS report and sought additional information about the study. Although the CDC agreed to release all relevant documents, it refused to include identification of the women involved in the study.¹⁹⁵ On consideration of the protective order requested by the CDC, the court noted that the TSS report contained personal information concerning women who were in no way related to the lawsuit.¹⁹⁶ From the affidavits presented by both parties, the court concluded that "the validity of the CDC studies can be addressed without actually contacting the subjects."¹⁹⁷ Because the defendant had not shown that the identities of the women were relevant to disputing the validity of the study, the court granted the protective order.¹⁹⁸ In *Rasmussen's* case, by comparison, the identification of the donors is clearly relevant to proving the aggravation of injury claim. The plaintiff does not wish to use the information to prove a statistical probability that he contracted AIDS through a blood transfusion; he already has medical testimony to that effect.¹⁹⁹ *Rasmussen's* need, the same as any plaintiff in his position, is to identify the donors to establish the causal link between the development of AIDS and a specific donor(s) whose blood he received.²⁰⁰ Furthermore, the donors in *Rasmussen* were not totally removed from

¹⁸⁹*Priest*, 98 F.R.D. at 760.

¹⁹⁰*Id.* at 761.

¹⁹¹42 U.S.C. §§ 2000e-2000e-17 (1982).

¹⁹²*Priest*, 98 F.R.D. at 761-62.

¹⁹³See *supra* notes 80-82 and accompanying text.

¹⁹⁴*Lampshire*, 94 F.R.D. at 59.

¹⁹⁵*Id.*

¹⁹⁶*Id.* at 60.

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 60-61.

¹⁹⁹See *supra* text accompanying note 63.

²⁰⁰See *supra* note 82.

the circumstances that culminated in the lawsuit. Each of them donated blood that the plaintiff received. One or more of them, "in all medical probability," passed to the plaintiff the disease that caused his death.²⁰¹

In *Plante*, the Fifth Circuit Court of Appeals appraised the validity of financial disclosures required by Florida's Sunshine Amendment.²⁰² The amendment, which required *public* disclosure of the financial status of *public* officials, was enacted following "political scandals" involving Florida officials.²⁰³ Faced with the narrow issue of financial privacy, the *Plante* court held that the interests of the public outweighed the opposing confidentiality interests.²⁰⁴ A case like *Rasmussen* involves issues distinct from those of *Plante*. The issue is not the financial privacy of public officials. Moreover, no public disclosure of the data is required. Indeed, the *Plante* court, like the Supreme Court in *Whalen*, recognized the disclosural privacy right but did not, by its ruling, define the scope of that right.²⁰⁵

On the basis of these three decisions, it is entirely unclear whether information concerning a blood donor's drug use, medical, or sexual histories would be entitled to constitutional protection. On the basis of the Supreme Court's privacy decisions, however, it is unlikely that such information would find protection in the Constitution.²⁰⁶ The Court has narrowly limited the invocation of the right to privacy to areas "implicit in the concept of ordered liberty."²⁰⁷ Moreover, although the Court has recognized the disclosural right to privacy, it has never upheld that right.

The *Rasmussen* case presents competing interests similar to those in situations the Supreme Court has addressed.²⁰⁸ As in *Whalen*,²⁰⁹ the threat of injury to reputation is remote. *If* the court ordered protective

²⁰¹See *supra* note 63 and accompanying text.

²⁰²575 F.2d at 1119, 1122 (citing FLA. STAT. ANN. § 112.3145 (West Supp. 1978)).

²⁰³*Plante*, 575 F.2d at 1122.

²⁰⁴*Id.* at 1137-38.

²⁰⁵*Id.* at 1132-35.

²⁰⁶One amicus opponent to discovery in *Rasmussen* cited *Whisenhunt v. Sprodlin*, 104 S. Ct. 404 (1983), as authority for the statement that the Supreme Court "specifically held that the constitutional right to freedom from public intrusion encompasses sexual conduct between consenting adults." Brief for CCBC, *supra* note 95, at 11. In *Whisenhunt*, however, certiorari was denied. The dissenters to the denial expressed their view that because fundamental rights were implicated, "the notice requirement of the Due Process Clause demands particular precision in this case." *Whisenhunt*, 104 S. Ct. at 409 (Brennan, Marshall, Blackmun, J.J., dissenting).

²⁰⁷See *supra* notes 136-37 and accompanying text.

²⁰⁸In the only reported case of AIDS victims claiming constitutional protection, a New York court held that the Equal Protection Clause did not apply to prisoners with AIDS because that clause "requires that similarly situated people be treated equally. . . . AIDS victims are not similarly situated." *Cordero v. Coughlin*, 607 F. Supp. 9 (S.D.N.Y. 1984) (mem.).

²⁰⁹See *supra* notes 148-58 and accompanying text.

discovery measures,²¹⁰ and *if* the measures were breached, word of the donor's *possible* affiliation with AIDS *could* leak to the public. Whether such a far removed and hypothetical result would find protection in the Constitution, in the face of the vital state interest of promoting fair and efficient litigation, is doubtful.²¹¹

Similar to the plaintiff in *Paul*,²¹² the donors in a case like *Rasmussen* may suffer injury from the disclosure of facts affecting their reputations. However, the Supreme Court in *Paul* flatly refused to recognize one's reputation as the basis for constitutional protection. In fact, the Court denied relief despite the fact that the potentially damaging information had been disclosed in published form, and that the person facing potential injury *himself* asserted the claim.²¹³ *Rasmussen* is distinguishable from *Paul* on several points. Initially, a court may regard information concerning a blood donor's medical, drug use, and sexual histories as more "intimate" than information concerning one's police record.²¹⁴ On this basis alone, a court may consider a blood donor's reputational interest greater than the interest asserted in *Paul*. However, the remaining distinctions between *Paul* and *Rasmussen* indicate that discovery should be allowed. In *Rasmussen*, for example, only the potential for disclosure of personal information exists.²¹⁵ Furthermore, public disclosure of even the donors' identities is not required and discovery would be subject to judicial control.²¹⁶ In addition, the blood donors' constitutional rights

²¹⁰Federal courts' discretion in issuing protective orders is almost unlimited. Federal Rule 26(c) allows the court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c) (emphasis supplied).

²¹¹"The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. 'Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.' *Hickman v. Taylor*, 329 U.S. 495, 507 (1974)." FED. R. CIV. P. 26 advisory committee note.

²¹²See *supra* notes 159-66.

²¹³*Paul*, 424 U.S. at 712.

²¹⁴See *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) ("Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.'").

²¹⁵See Brief for Miami Herald, *supra* note 141, at 20-21. It argued:

There may, in fact, be no need for any such probing discovery. Upon receipt of the list of names, *Rasmussen* may discover that one or more of the donors have died from or are suffering from AIDS by simply checking the names against public death records or other records maintained by the Center for Disease Control, United States Department of Health and Human Services. He may discover all are perfectly healthy. Those on the list with AIDS, or who may themselves be in a "high risk" group, may be willing to disclose this fact under the circumstances of this case, or, as Judge Schwartz suggests, there may be donors who are ill, but do not know they may be suffering from AIDS. Any such individuals might find *Rasmussen's* discovery beneficial.

Id.

²¹⁶See *supra* note 210.

are being asserted, without their consent or knowledge, by an institution which may have an ulterior motive for opposing discovery. Therefore, in cases like *Rasmussen*, the courts must consider whether a blood organization should be allowed to assert the privacy rights of its blood donors. This issue is of special importance because blood organizations may assert these rights on the pretext of protecting their donors while, in reality, they are attempting to insulate themselves from liability.²¹⁷

5. *The consideration of blood bank liability for transfusion of AIDS.*

— As noted in the analysis of AIDS, blood centers did not employ uniform AIDS screening techniques prior to the institution of the HTLV-III test for antibodies in March, 1985.²¹⁸ As previously indicated, many centers refused to question their donors about sexual habits because of moral and ethical considerations.²¹⁹ One author recently noted this practice and identified it as a legitimate basis for blood bank liability in transfusion transmission cases:

[The philosophy] that direct questions regarding a donor's sexual preference are inappropriate because of moral and ethical considerations allows for a defensible argument that reasonable precautions were not taken to preclude high risk groups from donating blood. In considering the catastrophic consequences involved in contracting AIDS, a court could ask if the American Association of Blood Banks and Public Health Service recommendations are adequate, even if accepted and practiced as the standard of care by the medical community. . . . [C]ourts have been willing to hold that a standard that is accepted by the medical community is of itself unacceptable due to the severity of the damage that results from following such a standard.²²⁰

²¹⁷One court recently noted the irony of allowing an individual who has a "stake" in the outcome of the suit to oppose investigation of the matter by asserting the constitutional rights of a third person. In *United States v. University Hospital*, 575 F. Supp. 607 (E.D.N.Y. 1983), the federal government was investigating whether a hospital had wrongfully withheld medical care from a deformed infant whose parents refused to consent to surgical treatment. The parent-intervenors asserted that the child's medical records were protected by the constitutional right to privacy. The court stated in dictum:

The defendants' reliance upon the constitutional right of privacy is extremely weak. In the instant action, plaintiff is, at least implicitly, alleging the possibility that the parents of Baby Jane Doe, in refusing their consent to surgical procedures, were not acting in the best interests of the child. It would be highly paradoxical if an individual's right to privacy could be asserted by that individual's parent or guardian, purportedly acting in that individual's own best interests, for the purpose of precluding an inquiry into the question of whether the parent or guardian was in fact acting in the individual's best interests.

Id. at 615-16.

²¹⁸See *supra* notes 44-48 and accompanying text.

²¹⁹*Id.*

²²⁰Miller, *supra* note 23, at 3421. See also Appellant's Brief, *supra* note 12, at 11 ("A blood bank's potential total failure to screen high risk groups from donation by

The almost certain prognosis of death in AIDS cases may call for the highest possible standard of care in blood donor screening. The fact that a blood collection center adhered to a protocol requiring less, even if approved by medical authorities, may be insufficient to avoid liability in the courtroom.²²¹

Because a blood organization's basis for liability may be extremely broad in AIDS-related cases, and because the majority of transfusion transmission lawsuits have yet to surface,²²² it would be advantageous for a blood bank to ensure the confidentiality of its donor records. Therefore, in cases like *Rasmussen*, the courts should not address claims of constitutional rights until they are asserted by the individuals possessing those rights. Should the blood donors become involved in a lawsuit, they would face no obstacle to the assertion of their rights. That is, the nonparty donors, if faced with oppressive questioning, could move for a protective order just as nonparty South Florida did in *Rasmussen*.²²³ Moreover, the courts possess virtually unlimited discretion by which to protect the donors' rights, if and when they are asserted.²²⁴ On this basis, and in view of the remoteness of the possibility that the donors' intimate lives will be probed, the courts should grant discovery of the blood donors' identities. By granting discovery, the courts will promote fair and efficient litigation, prevent blood banks from masking their own liability, and reserve their judicial discretion for the protection of those who may choose to assert their constitutional rights.

V. CONCLUSION

AIDS-related lawsuits present multifaceted issues for which no clear guidelines exist. As the dimensions of the disease unfold, the legal implications compound. *Rasmussen* presents one court's version of a proper balance of the interests involved in the issue of donor discovery. Its status as the initial precedent in a rapidly expanding field could engender many analogous decisions. Caution should be used, however, in following the "law" of *Rasmussen*; as noted by the dissent in that case, it appears that the majority "put its thumb on the scales" of justice.²²⁵

The plaintiff's interest in pursuing meaningful discovery in the hope of obtaining full compensation must be accorded the weight it deserves. There is no form of discovery incapable of becoming oppressive; if all

available methods would never surface if the donors' names were suddenly to become totally confidential and non-discoverable.'').

²²¹Miller, *supra* note 23, at 3421.

²²²See *supra* notes 13-14 and accompanying text.

²²³467 So. 2d at 800.

²²⁴See *supra* note 210.

²²⁵467 So. 2d at 805 (Schwartz, C.J., dissenting).

potentially intrusive discovery were prohibited on the basis that it might meet resistance, few disputes would reach resolution in the legal forum. Moreover, the courts have broad discretion in molding the form and scope of discovery. In a case like *Rasmussen*, the names of the donors need not be brought into court, and the form of questioning can be controlled. The state interest in ensuring the fair and efficient resolution of disputes, along with the plaintiff's interest, should not be preempted by the remote possibility of abusive discovery when the court itself possesses the means to control the discovery process, should the need ever arise.

Rasmussen's interpretation of the disclosural right to privacy must be recognized for what it is — a broad extension of the Supreme Court's interpretation of that right. The case law upon which this extension was predicated does not support the *Rasmussen* conclusion; neither do the decisions of the United States Supreme Court. There is no "general" constitutional right to privacy. Aside from the right of privacy applied in relation to specific constitutional guarantees, the Supreme Court has narrowly limited the extension of the right to areas of fundamental concern: marriage, procreation, child rearing, education, contraception, and family relationships. Moreover, the Supreme Court has never upheld the disclosural right to privacy. A court choosing to extend that right to the drug use, medical, and sexual histories of voluntary blood donors must appreciate the magnitude of such an extension; it cannot be easily reconciled with cases like *Whalen*, *Paul*, and *Nixon*. Furthermore, there is a distinct possibility that a blood organization may have a self-serving ulterior motive for its tactics — the avoidance of prosecution.

Although lawsuits involving transfusion transmission of AIDS have just begun to surface, that particular mode of transmission, in light of the highly accurate HTLV-III antibody test, is virtually at an end. The assertion, therefore, that the fear of later questioning may prevent individuals from donating their blood is no longer of significant weight. Applying the *Whalen*²²⁶ test of remoteness, this interest must take second place to the unequivocal interest of the plaintiff.

It is entirely possible that a proper "balance" of the interests may, in different fact situations, lead to diametric results. The concern, as the courts approach AIDS-related issues, is not that one result be uniformly reached; rather, it is that the respective interests be accorded their true legal weight.

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²²⁶See *supra* notes 148-58 and accompanying text.

